23864

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

G. H. THAYER, Administrator of the Estate of David Whitney, Jr., Deceased, D. C. WHITNEY and CHARLES STINCHFIELD, Trustees under the Will of David Whitney, Jr., Deceased, Substituted for DAVID WHITNEY, JR., and CHARLES STINCHFIELD, and JAMES A. REMICK, Trustee. — *Plaintiffs in Error,*

vs.

A. N. SPRATT, — *Defendant in Error.*

18,346

Brief of Defendant in Error.

STATEMENT OF THE CASE.

The Statement of Facts set out at pages 3 to 4, Brief of Plaintiffs in Error is substantially correct except that some of the undisputed facts are left out. The cause was brought by plaintiffs in error against the defendant in error, Spratt, to remove a cloud from the title claimed by them to certain lands in Cowlitz County, Washington. The deeds complained of in their complaint being two certain warranty deeds to Spratt from Smith and Radcliff, covering two quarter sections of land taken up by them under the timber and stone act of June 3, 1878. The sale of these lands to Spratt was made about six months after final proof of entry, and for the sum of $1600. The deeds conveying said land were recorded in the County where the lands were situate. Defendants' first further and separate answer sets up that Spratt is in fact the

equitable owner of these lands; that he purchased the same from James M. Radcliff and Frank Smith, who had made final proof and received final certificates, and that the same were wrongfully cancelled. That the plaintiffs deraign their pretended title to said lands through deeds from subsequent entrymen who had obtained patents from the Government. That the entries of Smith and Radcliff were cancelled on an ex parte hearing before the Land Department upon notice mailed to the original entrymen at their former places of residence but that Spratt never received any notice or had any knowledge of the holding of the entries for cancellation, nor any notice or knowledge of the proceedings in the Land Department. It is further alleged and admitted that the report of the Special Agent of the Land Department based upon which the entries were held for cancellation showed that Smith and Radcliff, after making final proof, transferred the lands to A. N. Spratt, by warranty deeds, and that said deeds were recorded in the office of the County Clerk of Cowlitz County, where the lands were situate. It is further alleged with particulartiy that the entries were in fact legal and valid. And the third further and separate answer alleges that the officers of the Land Department cancelled said entries under a mistaken construction of said timber and stone act of June, 1878, that is, they held and ruled erroneously, that land covered with a heavy growth of valuable timber, if it could be successfully cultivated after the timber was removed, then that such lands were not chiefly valuable for the timber thereon, and were not subject to entry as timber lands under said act of June 3, 1878, although the timber on such lands might be their chief value and such lands might not at all be cultivated in their then condition.

This erroneous construction prevailed in the Land Department at this time and until the decision of this Court in the case of U. S. v. Budd & Montgomery, 144 U. S. 154.

It is also claimed that the defendant Spratt was a bona fide purchaser.

The prayer for relief asks the Court to decree that defendant is the equitable owner of the lands in controversy, and that the plaintiffs hold the legal title thereof in trust, etc.

The reply consists of a general denial of the allegations contained in the further and separate answer of the defendant; and then proceeds to set forth the proceedings in the Land Department concelling the entries under which Spratt claims. It does not set up that Spratt was a party to the cancellation, or that any kind of notice was ever given him by the department. And after setting up these proceedings, the reply in the case of each entry concluded with the following: "And plaintiffs plead said holding and decision by the Commissioner of the General Land Office as to the character of said land as a conclusive bar to the claims of defendant set up in his separate answer herein to said ——— quarter of Section 32, etc."

This was the only defense outside of the general denial, specifically set up by the plaintiffs to bar the defendant's equitable title to this land.

The case came on for trial before the Superior Court for the County of Cowlitz, and State of Washington.

Oral testimony, the reading of the deposition of A. N. Spratt, and all the testimony and proceedings of the Land Department being included in Exhibits "A" and "B," were offered in evidence in accordance with stipulation of counsel (see stipulation marked Exhibit "M," commencing at foot of page 74, printed Abstract of Record). The case was tried before Judge A. L. Miller, who, based on said evidence, made full findings of fact in which he sustained nearly all the material allegations contained in defendant Spratt's further and separate answer, except that he did not allow the contention of bona fide purchaser on the ground that there could be none before patent had been issued, and, therefore, made no finding of fact covering this contention. He, however, made findings that the original entries of Smith and Radcliff were in fact legal and valid. That they were wrongfully cancelled by the

officers of the Land Department under a misconstruction of the timber and stone act of June, 1878. That during all the times these proceedings were pending in the land department the officers of that department had actual knowledge that Spratt had purchased these lands from the original entrymen, and that he was never served with notice of the proceedings, and did not appear either in person or by counsel. The findings of fact are full and complete and will be found in the printed Abstract of Record, commencing at page 25, Findings Nos. 1-47.

There were also two other quarter sections taken up under the pre-emption law involved in the suit, but the Court found with the plaintiffs as regards these, on account of the failure of proof as to the required improvements.

Based on the findings of fact, the Court made a decree that the defendant was the equitable owner of the land covered by the two timber entries of Smith and Radcliff, and that the plaintiffs held the legal title in trust, etc.

From this decree the plaintiffs appealed to the Supreme Court, and in a well-considered opinion the decree of the lower Court was affirmed. In the opinion the Court found that Spratt was entitled to notice of the action of the Land Department respecting the cancellation of these entries and that as they failed to give him notice, the department's decision cancelling the entries did not preclude him from having his day in court to prove their validity.

The Court also in its opinion states that it has examined the evidence, and approve the findings of fact of the trial Court.

Throughout the whole case it was the contention of counsel, as shown by his reply, and objection to the testimony of the witness C. N. Hogan (page 46, printed Abstract of Record) that the decision of the officers of the Land Department cancelling the entries bound the defendant Spratt.

POINTS AND AUTHORITIES.

I.

This Court has no jurisdiction to review the judgment of the state Court, for the reason that the record does not show that a federal question was raised either in the trial or appellate Court.

Jacobi v. Alabama, 23 Sup. Ct. Rep. 48.
Iowa v. Rood, 23 Sup. Ct. Rep. 49.
Maxwell v. Newbold, 18 How. 511.
Oxley Stave Co. v. Butler Co., 166 U. S. 648.

II.

The Land Department having cancelled the entries without notice to the transferrer Spratt, it would not conclude him, and he would, notwithstanding the decision, have the right to show, by proof other than the cancelled certificate, that the entries were valid.

Guaranty Savings Bank v. Bladow, 176 U. S. 448.
Hawley v. Diller, 178 U. S. 488.
American Mortgage Co. v. Hopper, 64 Fed. 559.
Guaranty Savings Bank v. Bladow, 69 N. W. 41, 6 No. Dak. 108.

III.

It is a settled rule in the Land Department, that if it appears from a special agent's report (as it did in this case) or by other evidence that the land had been transferred to a third party by the original entrymen, then it becomes the

imperative duty of the officers of the Government, to give such transferee notice of the proceedings relative to the cancellation of such entry.

United States v. Copeland, 5 L. D. 170.
United States v. Richardson, 5 L. D. 253.
Windsor v. Sage, 6 L. D. 440.
United States v. Thomas, 9 L. D. 576.
Fleming v. Bowe, 13 L. D. 78.
United States v. Newman, 15 L. D. 224.

IV.

In order to defeat the holder of the equitable title, on the ground of having purchased on faith of record title in good faith, it must be specially pleaded and proved.

Pomeroy's Eq. Juris., Vol. II, Sec. 784-5.
Story Eq. Pleading (8th Ed.), Sec. 805a.

V.

The trial Court having made full findings of fact which were approved by the Supreme Court of the State, such findings are conclusive on a writ of error to such courts from the Supreme Court of the United States.

Jenkins v. Neff, 186 U. S. 230 (cases cited).
E. Bement & Sons v. Nat. Harrow Co., 186 U. S. 570 (cases cited).

VI.

This Court can only look beyond the federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question.

McLaughlin v. Fowler, 154 U. S. 663.

ARGUMENT.

The first inquiry which arises upon the record herein is whether or not a federal question was raised in the trial Court.

The record does not show that plaintiffs in error "specially" set up or claimed a right or title under a statute or authority of the United States, in either the trial or appellate courts.

The allegation in the reply that "plaintiffs plead said holding and decision by the Commissioner of the General Land Office as to the character of said land as a conclusive bar to the claims of defendant," does not "specially" set up a right or title under a statute or authority of the United States, within the meaning of section 709 of the Revised Statutes.

In fact this allegation does not pretend to set up a right or title of any kind in the plaintiffs in error, but simply denies a right asserted by the defendant. But even if it can be said that some right or title is claimed no statute or authority of the United States is specified or referred to.

In Maxwell v. Newbold, 18 How. 511, this Court said: "The clause in the Constitution and law of Congress should have been specified by the plaintiffs in error in the State Court, in order that this Court might see what was the right claimed by them, and whether it was denied to them by the decision of the State Court."

In Oxley Stave Co. v. Butler Co., 166 U. S. 648, 654, it is said: "But can it be said that the plaintiffs specially set up or claimed the protection of that amendment against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties? This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes."

Plaintiffs in error have failed to point out even in their brief herein what statute or authority of the United States they specially claim a right or title under, or even what special right or title they claim.

Counsel in their brief say that three questions arise on this writ of error, to wit:

I.

"Was Spratt entitled to notice of the proceedings in the Land Office resulting in the cancellation of the entries?"

II.

"The Land Department having cancelled the entries of Smith and Radcliff on the ground of their being fraudulent and that the land was agricultural and not timber land, is not that a decision of a question of fact and is not the judgment of the officers of the Land Department conclusive and not reviewable by the courts?"

III.

"Conceding that Spratt was entitled to notice of the proceedings to vacate the Smith and Radcliff entries, and that he did not have such notice, is he not compelled in his suit to show by his testimony the existence of the same facts that the entrymen, Smith and Radcliff, would have been compelled to show upon the hearing ordered before the registrar and receiver of the land office?"

The first two questions we think are properly treated under one head and will therefore be discussed together.

The third is hereinafter referred to under the title of "Evidence."

Counsel's contention that the decision of the Land Department cancelling these entries bars Spratt of his equitable title has not only been settled to the contrary by this Court, but has also been time and again repudiated by the very tribunal that cancelled them.

Rule as to Notice in the Land Department.

It will be remembered that it appeared from the Special Agent's report upon which the order of cancellation was based (see printed Abstract of Record, page 57, also pages 66-7) that transfer had been made of these lands to A. N. Spratt—that the deeds were of record, etc. It further appeared from the letters of the Acting Commissioner (see printed Abstract of Record, page 59, also pages 68-9) that transfers had been made to Spratt and the Commissioner concludes the letters with the following: "If you have knowledge that the land has been transferred you will also notify the transferee."

Notwithstanding this knowledge of the fact that Spratt had purchased the lands and was the owner of whatever interest the original entrymen had in the same, the record shows that they never served or attempted to serve him with notice of these procedings.

Such a cancellation is not even recognized as a bar in the Land Department itself.

Time and again have orders cancelling entries been set aside for not giving notice to the transferee where it appeared that at the time the officers of the Government had actual knowledge that such transfer had in fact been made. One of the earliest cases is that of the United States v. Copeland, 5 L. D. 170. In that case it is said:

"And when the entryman has sold the land covered by his entry and the entry is attacked for fraud or illegality, the entryman and his transferee are entitled to a hearing before the proper tribunal to defend, and the burden of proof is upon the party attacking the entry.

"In the case at bar the Special Agent's report discloses the fact that Miss Copeland had sold and conveyed her interest in said land and the deed for the same was of record and constructive notice * * * to everybody * * * Waldock was entitled to notice of the decision cancelling said entry."

This was adhered to in the case of U. S. v. Richardson et al., 5 L. D. 253, where it is said:

"In the case of the United States v. Copeland et al., 5 L. D. 170, the Department held that where the Special Agent's report, on which the cancellation was based, discloses transfer of the land after the issuance of final certificate, such transferee should receive notice of the cancellation. In the case at bar, the notice was not received by the entryman thirty days prior to the day fixed for the hearing, and the Special Agent's report discloses the name of the transferee. Under the rules of practice and the decisions cited (*supra*) the decision of the local officers was correct, and should be affirmed. For the foregoing reasons, said decisions of your office must be modified, and the case will be returned to the local land officers, with directions to them to issue an alias notice to the entryman, and

to give notice to the transferee in accordance with the rules of practice."

In the case of Windsor v. Sage, 6 L. D. 440, it is said:

"It is clear under the decisions of this Department, the transferee has the right to appear and defend. Indeed, when the report of the Special Agent shows that there is a transferee, such prson is entitled to have notice, and has a legal right to appear and defend the validity of said entry." (Citing authorities.)

Other cases holding the same rule are cited in this brief under Points and Authorities III.

Counsel in their brief quote from the case of Cook v. Blakely, 50 Pac. 981, which cites the following Land Office decisions to sustain the proposition that notice to a mortgagee or transferee is not necessary: Featherspiel's case, 4 Land Dec. 570; Hill's, 5 Land Dec. 276; Jolime's case, 5 Land Dec. 589; U. S. v. Lawrence, 16 Land Dec. 47.

Now, in Featherspiel's case and Jolime's case, it will be noted that there was nothing in the opinion to show that the Department had notice of the transfer, but in the other two cases the opinion was put expressly on the ground that there was nothing in the Land Office record to show that a transfer had been made.

Counsel at page 7 of his brief inferentially states that at the time these proceedings were being carried on that Spratt's residence was unknown, and that he therefore could not be served. We think that this is immaterial and not shown by the record—neither does the record show that any effort was made by the officers of the Government to ascertain his whereabouts. As we understand it at this time the Rules of Practice provided for a service by publication, based on affidavit that the party could not be found—similar to the statutes in force in most of the states. However, the record in this case shows

that the officers of the Government must have known the address of Spratt, who testified that he, during the time these proceedings were pending was residing at Alpina, Michigan, and had been such resident of that place for thirty years.

The Special Agent's report not only showed the transfers but he also gives the kind of deeds (warranty), amount of consideration, their dates, and the dates they were recorded. Such recorded deeds both recite as follows: "Know all men by these presents: That I, Frank Smith (or James Radcliff) of Oak Point, Washington Territory, in consideration of $800 to me paid by A. N. Spratt of Alpina, Michigan," etc. (See Exhibits 2 and 3, pages 72-3, printed Abstract of Record.)

The rule that a transferee is entitled to notice where the officers of the Government know of such transfer is so thoroughly settled, that they could not disregard it and cut the defendant off without a hearing, and when it appears that they have disregarded rules and decisions and thus taken away vested rights, the Court will grant relief. Speaking of this power of the officers of the Land Department to abrogate its rules and decisions, Judge Sanborn, in the case of Germania Iron Co. v. James et al., 89 Fed. Rep. 811, says:

"* * * What a farce the attempt to secure rights in any judicial tribunal must become, if its rules and practice are ignored or applied at the arbitrary will of the judge who presides over the Court! Under such an administration of the Land Department, the rights and titles which the law attempts to protect and secure would become naught but privileges dependent upon the gracious favor of its officers. The power to degrade them to this rank cannot be found in the supervisory authority of the Secretary or of the Commissioner. Their power of supervision is not unlimited or arbitrary. 'It cannot be exercised so as to deprivve any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a ested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order

of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.' Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. 122; Bogan v. Mortgage Co., *supra*."

Rule Adopted by the Courts.

For the purpose of showing just what was involved in the decision of this cause by the Supreme Court of the State of Washington, we would respectfully refer the Court to the opinion which is found at pages 80-83, printed Abstract of Record. As we understand it the State Court merely followed the settled rule of this Court and holds: That defendant Spratt the transferee, and as such, the equitable owner of the land, was entitled to notice of the hearing and determination of the controversy in the Land Department; and he having alleged and proven that no notice of any kind was ever given him and that he was not a party to said proceedings, was entitled in this suit to prove by evidence other than the cancelled certificate the validity of said original entries.

The decision is placed squarely upon the holding of this Court in the case of Guaranty Savings Bank v. Bladow, 176 U. S. 448.

Counsel quotes from numerous authorities, holding that there can be no such thing as a bona fide purchaser before patent has been issued by the Government.

It is unquestionably the rule that a person who purchases from the entryman before patent cannot claim to be a bona fide purchaser and notwithstanding the fact that the original entry was illegal, prevail against a patent issued subsequently to another.

The trial Court never made any finding that Spratt was a bona fide purchaser; but found that he was entitled to prevail because the original entries of Smith and Radcliff were in fact

legal and valid. The Supreme Court affirmed the decree of the trial Court and put its decision on the same ground. Such was the claim of counsel for the defendant Spratt before the Supreme Court of the State of Washington which is shown from the following quotation from their brief:

"Counsel, in his brief, seems to misunderstand our position. There is no question that there cannot be a bona fide purchaser of an equitable interest in the land in controversy, that is by a transfer after final certificate is issued and before patent. The defendant Spratt by his deeds merely took whatever interest the entrymen had under their final certificates; and if said entries were illegal, then he cannot rely on the fact that he was a bone fide purchaser and notwithstanding their illegality hold the land in controversy. But he being the equitable owner of the land at the time of the cancellation of these certificates, the Department having actual notice of such fact—and not having been made a party to the proceedings—such cancellation does not preclude him from having his day in Court to prove the legality of such original entries."

If there was ever any doubt as to this being the correct statement of the rule we think the two cases of Bladow v. Guaranty Savings Bank, 176 U. S. 448, and Diller v. Hawley, 178 U. S. 488, settle it.

Mr. Justice Peckham wrote the opinion in the first of these cases and fully discusses and lays down the rule as to the rights of transferees. We quote the following portions of that opinion:

"* * * The certificate was *prima facie* evidence of the right of the entryman to a patent, but the power rested with the Land Department, upon proper notice, to set it aside and cancel the entry, and thus take away from him that *prima facie* evidence. United States v. Steenerson, 4 U. S. App. 332, 50 Fed. Rep. 504, 1 C. C. A. 552; American Mortgage Co. v. Hopper, 56 Fed. Rep. 67; S. C. on Appeal, 29 U. S. App. 12, 64 Fed. Rep. 553, 12 C. C. A. 293. If the entry were cancelled

arbitrarily and without evidence or notice to him, it would not conclude him, and he would, notwithstanding the decision, have the right to show that his entry was valid, and that he was entitled to a patent. * * *"

"But the cancellation, although conclusive as to the entryman, upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee, if made without notice to such mortgagee and with no opportunity on its part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the Land Department, and therein showing the validity of the entry, or from proceeding before a judicial tribunal against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been cancelled. Had the mortgagee taken either of these courses, it might have demanded in the one case, upon proving the validity of the entry, that a patent should be issued to the mortgagor or his grantees, leaving the land subject to the lien of the mortgage, or if a patent had been issued, the mortgagee might have demanded relief against the patentee upon proof of the validity of the entry, in a proceeding in Court to hold him as trustee. * * *"

Again, in the same opinion:

"If the plaintiff in error, even in this foreclosure suit, had alleged that the entry had been canceled, and that a patent for the land had been thereafter issued to the defendant, and had asked that the patent so issued to him should be held by him in trust and as security for the payment of the plaintiff's mortgage on the ground that the entry had been improperly canceled as to it, and had proved on the trial that Anderson's entry was legal, it may be that it would have been entitled to a judgment decreeing the defendant a trustee of the title under his patents from the Government and providing for the sale of the land in order to pay the mortgage, or some other appropriate relief might have been granted."

The case at bar is much stronger than this or any of the cases we have cited, in that it does not appear, as it does in this case, that at the time the officers of the Land Department had actual knowledge of such transfer.

In the still later case of Diller v. Hawley, 178 U. S. 488, Mr. Justice Harlan, who wrote the opinion of the Court, recognizes the same rule, as follows:

"Of course, that Department could not arbitrarily destroy the equitable title acquired by the entryman, and held by him or his assignee. Those who hold such title have a right to be notified of and heard in any proceeding instituted in the Land Department having for its object the cancellation of the entry upon which the equitable title depends."

Counsel in their brief cite and quote at length from the case of American Mortgage Co. v. Hopper, 64 Fed. 559, decided by the Court of Appeals for the Ninth Circuit.

The Supreme Court of the State of Washington, commenting on the holding of this case, says:

"This is not inconsistent with the determination in Guaranty Savings Bank v. Bladow, *supra*."

In the Hopper case, the late Judge Raleigh Stott, who framed the issues and tried this case in the lower court, was also counsel and there contended that the transferee could not rely on the cancelled certificate, but must make out a *prima facie* case by other proof, showing that the original entry was in fact legal and valid. It will be noted that the Circuit Court of Appeals decided this to be correct and held that the transferee made no proof of the legality of the original entry except by the final canceled certificate and stipulation that he was qualified to make a legal and valid entry. However, the Court held that the transferee had the right to show that the entry was a legal and valid entry.

The case of Cook v. Blakely, 50 Pac. 981, cited and quoted from at page 11 of counsel's brief, is the only case we have

found that in anyway holds a contrary view; and to support the view there taken some decisions of the Land Department only are cited, with reference to the necessity of notice. We have already commented on these four decisions in this brief, under the heading, "Rule as to Notice in the Land Department"; and as stated there, they do not support either the contention of counsel in this case or the decision of the Court in Cook v. Blakely, which so far as we are aware was never affirmed by the Court of last resort of that State.

Commenting on this decision the Supreme Court of Washington in the present case well said:

"Some of the expressions used in the opinion in Cook v. Blakely do not seem to be in accord with the weight of authority."

The case of Parsons v. Venzke, 61 N. W. 1041, also cited by counsel, was put squarely upon the ground that all the parties had appeared and contested the case in the Land Department, and at page 1042 of the opinion it is said:

"When the bona fide purchaser who holds the interest of the entryman at the time of the commencement of the cancellation proceedings is not heard and has no chance to be heard before the Department, possibly the proceedings will be regarded as *ex parte* with respect to him and he be allowed to prove in Court the lawfulness of the entry." (Citing authorities.)

This case was afterwards brought before this Court on a writ of error (Parsons v. Venzke, 164 U. S. 89); and in the opinion of the Court, written by Mr. Justice Brewer, it is said:

"* * * A jurisdiction not arbitrary or unlimited, nor to be exercised *without notice to the parties interested,* nor one beyond judicial review under same conditions as other orders and findings of the Land Department.

"In this case the entryman was brought in by due publication of notice, *and the real party in interest appeared.* The

contest was carried through the Land Department from the lowest to the highest officers, and there is nothing in the record which brings the case within the rules so often laid down for a judicial reversal of the decisions of that Department."

EVIDENCE.

Counsel in their brief not directly but by inference seem to question the proof offered by defendant in error to sustain the validity of the original entries and also the findings of fact of the trial Court, which were specifically approved by the Supreme Court; and in the concluding page of their brief prints the oral testimony. They however have omitted a large part of the testimony offered by stipulation and otherwise, as is shown by the record.

Before proceeding further, it will be remembered that the trial Court made full and complete findings of fact covering the validity of these entries and showing a full compliance with the Timber and Stone Act of June, 1878. Plaintiffs in error appealed the case to the Supreme Court of the State, and that Court in its opinion, commenting on the proof offered, say:

"He (meaning defendant in error) has not relied upon the certificate of the entries of Smith and Radcliff, but has shown by evidence other than the certificates the validity of those entries. The findings of fact of the trial Court show that the land in controversy was in fact timber land within the provisions of the Act of Congress, and that the entries were made in good faith. We have reviewed the testimony and we fully approve the findings."

Counsel's contention as we understand it is that the proof offered by Spratt was not sufficient to sustain the findings of fact of the trial Court. Now there is no rule better settled than the one that this Court on a writ of error to the State Court,

will treat such findings as conclusive. (See cases cited under Points and Authorities IV.)

Undoubtedly, however, if this case now came before this Court to be tried *de novo* it would make exactly the same findings.

The proof offered was full and complete.

Affidavits of the original entrymen together with the testimony of their witnesses at the making of final proof was offered in evidence by plaintiffs in error, and admitted and considered in accordance with written stipulation marked "M." These affidavits and the testimony of the witnesses will be found included in Exhibits "A" and "B" and the parts relating to the two timber entries can be found at pages 51-55, printed Abstract of Record, also pages 61-64. There was no objection as to the competency of this testimony or motion made to strike it out either in the trial Court or the Supreme Court of the State. It was introduced as stated before in accordance with the written stipulation marked Exhibit "M," which is printed in the Abstract of Record commencing at page 74, Printed Abstract of Record, from which we quote as follows:

"It is hereby stipulated by and between the respective parties to the above entitled suit—

"1. That the certified copies from the Commissioner of the General Land Office herewith filed in this case, marked Exhibits "A," "B," "C" and "D," together with letters, Exhibits "E," "F," "G," "H," "I," "J," "K" and "L," are correct, full, true and complete transcripts of all proceedings of the land office at Vancouver, Washington, and of the General Land Office, Department of the Interior, Washington, D. C., touching the pre-emption entry of Frank Smith for the northwest quarter of section thirty-two, township nine, north, range four, west of the Willamette meridian, and of the timber-land entry of Frank Smith for the northeast quarter of section thirty-two, township nine, north, range four, west of the

Willamette meridian, and of the pre-emption entry of James M. Radcliffe for the southwest quarter of section thirty-two, township nine, north, range four west W. M.; and of the timber-land entry of James M. Radcliffe for the southeast quarter of section thirty-two, township nine, north, range four, west W. M.; *and that said exhibits are in evidence in this case and may be considered by the Court.*

Exhibits "C" and "D" and certain other exhibits were omitted from the record on appeal, according to another stipulation as to the statement of facts, which states that they are not incorporated therein "by agreement of counsel for the reason that the said exhibits refer entirely to and contain certain pre-emption entries of said Smith and Radcliffe and nothing appears in said exhibits so left out relating to or concerning said timber entries.

Counsel now in their brief criticise the proof of the defendant in error because the witnesses Smith and Radcliffe were not personally called as witnesses. What was the necessity of calling them—they could not, if called, have added to their former testimony introduced in evidence by their written stipulation.

Such a contention has no merit in it, for counsel themselves by this written stipulation have stipulated that these Exhibits "A" and "B" containing these affidavits and testimony "*are in evidence in this case and may be considered by the Court.*"

They never in any manner as the record shows objected to the testimony on the ground of its incompetency — or limited it as proof of any particular fact. They certainly are estopped at this late day by their written stipulation and failure to raise some objection to it in the trial court. See the late case of Jacobi v. Alabama, 23 Sup. Ct. Rep. 48.

It was proved by two witnesses of many years experience in examining timber lands—C. N. Hogan and Robert Osborn

(see printed Abstract of Record, pages 45-50)—that these lands were chiefly valuable for their timber, and that they were unfit for cultivation in their then condition.

The only thing in evidence in the case with reference to any fraud or speculation is contained in the bare statement of the Special Agent, made prior to the cancellation, that he believes the entries were fraudulent—there is not a bit of evidence from him stating a circumstance of the fraud. On the other hand, he states that B. I. Dietz and C. N. Hogan will swear that the entries were made for speculation, or fraudulently. Hogan, who was a witness in this case in the Court below, swears positively that he was with the Special Agent at the time the land was examined by him; and that he never heard or had any knowledge of any fraud or speculation.

The only fact placed before the Land Department to show an entry for speculation, was the statement in the report of the Special Agent that the lands were transferred to defendant Spratt, after final proof and before patents were issued, which these entrymen had a perfect right to do under the repeated holdings of this Court.

We also have the deposition of the defendant Spratt that he purchased the land from the original entrymen by warranty deed, and that he never had an agreement, directly or indirectly, with them prior to their acquiring title.

The letter of the Commissioner holding these entries for cancellation was put upon the sole ground that the land was not subject to entry, and the notice sent to the entrymen shows that it was upon this ground that the entries were held for cancellation.

The record of the Land Department also clearly shows that it was only in following the misconstruction of the Timber and Stone Act of June, 1878, that the validity of these entries was ever questioned. As the Court is aware, until the decision in the case of U. S. v. Budd & Montgomery, *supra*, the Land

Department held that if the timber could be cut and removed, no matter how valuable it might be, and the land afterwards be used for cultivation, then it could not be taken up under this Act. That is, they held that in determining the character of the land its then condition did not control.

The two affidavits accompanying the Special Agent's report, upon which the entries were canceled can be found at pages 58 and 67, printed Abstract of Record. In these affidavits appears the following language: "Soil, dark clay loam, gently rolling; creek running across this land; covered with fir, cedar and hemlock trees; *this would be valuable land for agricultural purposes after timber is removed.*"

The order cancelling these entries on such a record is clearly at variance with the construction given the Act by this Court.

While defendant in error offered proof which clearly demonstrates the legality and validity of these entries, the plaintiffs in error have offered nothing to the contrary. The position taken by them as is disclosed by the record throughout this case, was that the decision of the Land Department was conclusive as to Spratt's equitable ownership of these lands.

In regard to the proof required in this class of cases it is said in Bladow vs. Guaranty Savings Bank, 69 N. W. 43:

"Moreover, in such cases the Court would incline to consider slight evidence as sufficient *prima facie* proof that the original entry was in fact valid, and compel the holder of the patent to sustain by evidence the finding of the Department that it was illegal. No hardship could result to the holder of the patent from such a rule, for the fact that the cancellation of the original entry was *ex parte* will appear from the records of the land office, and he is therefore chargeable with knowledge that the question of fact whether such entry was legal is still open to investigation in the courts, and that from the very nature of the case the original entryman or those claiming

under him, should not be held after the lapse of a considerable period of time, to a high degree of proof to establish a *prima facie* right."

Counsel in their brief speak of the fact that the plaintiffs purchased on the faith of the patent and record, and that it would be a dangerous rule to now deprive them of this land. This was not in issue in the trial Court, and had it been it would undoubtedly have been met. There is nothing in the reply or pleadings of such a state of facts.

There is no rule better settled than that he who seeks to defeat the equitable owner must allege and prove that he bought on the faith of the record title—that is, that the doctrine of bona fide purchaser is a defense that must be specially pleaded and proved. There is nothing either in the pleadings or proof that plaintiffs bought these lands without knowing of Spratt's recorded deeds. See Points and Authorities IV.

In the brief of appellants several cases are cited which hold that it is not necessary to plead the defense of *laches* to bar an equitable right. Admitting such to be the rule, yet it seems to us where such a defense is not pleaded—that *prima facie* a most unwarranted case of *laches* as defined by the authorities should be shown in order to defeat the equitable owner of his title. For had such a defense been an issue at the trial such equitable owner could no doubt have shown facts excusing the delay; and that his claim of ownership was well known to all the parties in interest.

The rule with reference to this as announced in numerous decisions of this Court is that *laches* is not like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced.

Under the facts there has been no such *laches* shown as should bar defendant from the relief asked. In the first place, it must be remembered that the patents to the entryman under which plaintiffs claim were not issued until June 25, 1890.

Now, during the time intervening between the date of the cancellation of the entries in question and the date of patent, the only remedy the defendant could have had was to have filed an application in the land office to have these entries reinstated. But that would have availed him nothing, because the case of Montgomery & Budd v. United States was not decided by the United States Supreme Court until long after the date of these patents; and as the Court knows, until that was decided, the officers of the Land Department continued to follow their erroneous construction of the Timber Act. For this reason Spratt had no remedy before the Land Department. There is no testimony in the record that the land in question is more valuable today than it was at the date of these patents, or at any other prior date. There is no testimony, nor is it a fact that the plaintiffs have made any improvements on these lands. There is no testimony that the defendant has ever acquiesced in the claim of the plaintiffs. There is no testimony in the record that during the time since patent was issued, and up to the time of filing the complaint herein, that anyone was ever in possession of the land.

These facts being before the Court, how can it for a moment be contended that the equitable owner of this land, by reason of delay only, without any other element intervening, is not entitled to relief in a court of equity?

No decision holding a party guilty of *laches*, and therefore not entitled to relief, was ever founded on such a state of facts and circumstances as exist in the case at bar.

Plaintiffs themselves brought this suit to remove a cloud from their title to these lands, and it seems to us that they, after the long delay in bringing it are in a rather peculiar position to complain of stale demands or *laches*.

While these last contentions of counsel are without merit under the pleadings and facts in this case, yet if the Court should determine that a federal question is involved, as counsel claim, towit, the binding effect of the cancellation of these en-

tries by the Land Department—but holds that it was properly decided in favor of defendant in error, the Court, as in numerous cases decided, will not pass on these other questions, and disturb the judgment of the State Court.

The case is respectfully submitted with the fullest confidence that the Supreme Court of the State of Washington was correct in affirming the decree of the trial Court.

JOHN H. MITCHELL,
Attorney for Defendant in Error.